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reasons applied in the construction of those statutes apply with equal force to the principal case.

R. K. D.

NOTE.—Since the above was written the Supreme Court of Pennsylvania has reversed the decision of the Court of Common Pleas. (April 17, 1916.)¹⁶

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—PROHIBITIVE TAX ON TRADING STAMPS—The general use of trading stamps and coupons in connection with retail sales has been productive of considerable regulative legislation, the validity of which after frequent review in the state courts has now for the first time been considered by the Supreme Court of the United States. Twenty-three states have attempted either to prohibit or to impose license fees which are in effect prohibitive taxes upon the selling or use of trading stamps and coupons. Similar legislation has been enacted for the District of Columbia and the Territory of Hawaii.

In the state courts, the overwhelming weight of authority has condemned these statutes as an arbitrary discrimination against a legitimate business and as an unwarrantable interference with the liberty of the citizen, in violation of the Fourteenth Amendment.¹ In the state cases it has frequently been declared that the use of trading stamps and similar devices is but a novel means of advertising, not essentially different from other lawful methods of attracting custom; and that there is no reasonable basis for selecting this particular mode of advertising to be prohibited, or taxed out of existence.² Time and again have these decisions upheld the legitimacy of the trading stamp enterprise, and asserted that as there is nothing in the business detrimental to the public health, morals, safety, or welfare, the state can neither prohibit it directly

¹⁶ In an opinion by Mr. Justice Von Moschzisker, the court said: "A careful reading of the statute convinces us it was never contemplated that the Courts of Common Pleas were to be constantly called upon to permit moving picture reels to be produced before them, and sit as supercensors thereof, in order to review the decisions of the administrative body created by the act. The evident intent was to grant a right of appeal to the Common Pleas Court so that tribunal could correct any arbitrary or oppressive orders which the Board of Censors might make, and nothing more; in other words, that the court might reverse the censors when the latter were guilty of abuse of discretion. This is the ordinary rule to which, on appeal, even this court restricts itself in reviewing an exercise of discretion, particularly of administrative officials."

¹ *Ex parte Drexel*, 147 Cal. 763 (1905); *State v. Caspare*, 115 Md. 7 (1911); *Sperry & H. Co. v. Owensboro*, 151 Ky. 389 (1912). The lower federal courts are in accord. *Cottrell v. Sperry & H. Co.*, 227 Fed. 256 (1915).

² *Hewin v. Atlanta*, 121 Ga. 723 (1904); *State v. Dodge*, 76 Vt. 197 (1904).

under color of the police power nor accomplish the same result indirectly by the imposition of excessive license taxes.³

The United States Supreme Court, however, when finally confronted with the problem, with full realization of the gravity of the question, and complete appreciation of the great body of state authority, has now rendered a contrary opinion. The occasion was three cases in each of which merchants issuing trading stamps or premium tokens attacked the validity of state laws imposing obviously prohibitive license fees on such tokens. All three cases were considered together and decided on the same day, the decision, being, as stated, that the statutes are valid.⁴

For the purpose of the decision, the court treats the statutes as in effect direct prohibitions upon the issuance of trading stamps and coupons. Thus considered, the argument for their validity would be that they were passed under a lawful exercise of the police power of the state; and the main argument in rebuttal would be that they violated the clause of the Fourteenth Amendment which forbids any state to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. It is fundamental to say that a valid exercise of the police power is not controlled or in any way affected by the provisions of the Fourteenth Amendment;⁵ but the state cannot, under the guise of police regulations, arbitrarily invade private property or personal rights, or arbitrarily discriminate between individuals or classes.⁶

Whether a law is beneficial to the public health, safety or morals is primarily and fundamentally for the legislature to determine, and the courts have nothing to do with the wisdom, policy, or expediency of the laws passed under the police power.⁷ But though the discretion of the legislature is very large, it is not final and conclusive; the courts have power to determine whether the law has a real and substantial relation to the public safety, health, or welfare, and whether it operates or tends in some real degree to promote or secure these objects.⁸

The courts, however, are loth to condemn a regulation, ostensibly police, as violative of the Fourteenth Amendment, and will not do so except where absolutely necessary. If it is possible to find

³ *Denver v. Frueauff*, 39 Colo. 20 (1906); *Nebraska v. Sperry & H. Co.*, 94 Neb. 785 (1913); and cases *supra*, notes 1 and 2.

⁴ *Rast v. Van Deman & Lewis Co.*; *Tanner v. Little*; *Pitney v. Washington* (U. S. S. C., March 6, 1916).

⁵ *Barbier v. Connolly*, 113 U. S. 27 (1885); *Powell v. Penna.*, 127 U. S. 678 (1888).

⁶ *Lawton v. Steele*, 152 U. S. 133 (1894); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

⁷ *Mugler v. Kansas*, 123 U. S. 623 (1887).

⁸ *Chicago, B. & O. Rwy. Co. v. Illinois*, 200 U. S. 561 (1906).

any reasonable basis for the classification made by the legislature, the courts will refuse to declare it discriminatory; and likewise if the due process clause is invoked, the courts will do their best to uphold the statute, if they can possibly find that it bears any reasonable relation to the public welfare.

It was avowedly with this attitude of mind that the United States Supreme Court examined the trading stamp laws. Mr. Justice McKenna says in delivering the opinion of the court: "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assured." This language is extremely significant, indicating as it does that the court will make an active effort to imagine some reasonable basis for the law, whether or not that basis is proved actually to exist.

Viewing the problem from that angle, the court felt itself able to find a sufficient difference between a business in which trading stamps were used and one in which they were not used, to meet the objection that the statutes were a denial of the equal protection of the laws; and in answer to the contention that the acts unlawfully infringed the business liberty of the complainants in violation of the due process clause, the court declared that it was reasonably possible to assume such deleterious effects arising from the use of trading stamps as to justify the statutes under the police power of the states. It thought that trading stamps or coupons are something more than advertising, but that even regarding their use as a means of advertising, the difference between a business in which coupons are used, and one in which they are not used, is pronounced, and that "the legislation which regards the difference is not arbitrary within the rulings of the cases".⁹ The court also thought that the persistent effort of the various legislatures to wipe out the trading stamp business, exhibited since 1880, must be due to some justifiable feeling that the business is undesirable. The court apparently felt that though it might not be possible to point out any definite evil in the use of coupons, yet the constant recurrence of these anti-coupon laws must indicate some such underlying detriment.

It must be admitted that there is a good deal of force in this reasoning, and it is quite possible that, as stated by the court, the apparent giving of something for nothing by means of trading stamps or the like may tempt the public to unwise expenditures.¹⁰

⁹ *Per* McKenna, J., rendering the opinion of the court.

¹⁰ "They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery'; may not be called 'gaming'; it may, however, be considered

But in these cases the Supreme Court has clearly shown its intention to uphold a law in spite of the great weight of other authority, where it is in any way possible to find a reasonable ground for so doing. Viewed in that light, the decision seems proper.

E. E.

CONTRACTS—VALIDITY—OUSTING THE JURISDICTION OR LIMITING THE POWER OF THE COURTS—It is universally conceded that parties to a contract may stipulate in many ways the rules of law for any legal proceedings to which they may become parties, which not only will bind them, but which the courts are bound to enforce.¹ Thus an agreement that a period less than that fixed by the statute of limitations shall be a bar to any action springing from the contract is valid.² Also that the action is not pursued in the particular way provided by the agreement of the parties is a valid defence to a suit at law brought in a different manner.³

But although the courts will allow this limited interference with their jurisdiction, they will not give validity to a contract that provides that neither party shall resort to the courts.⁴ In *Doyle v. Insurance Company*,⁵ the Supreme Court of the United States refused to sanction a contract to refrain from resorting to the courts of the United States.

The question then arises: Will the courts sustain an agreement to sue in only one certain court? This question has been answered in the negative in the recent case of *Nashua River Paper Company v. Hammerville Paper Company*,⁶ where the Supreme Court of Massachusetts held that a stipulation in the contract that no action should be maintained under the contract in any state court or federal court other than the state court of Pennsylvania, was unenforceable and would not preclude the maintenance of an action in Massachusetts. The argument to sue in only a certain court is a stipulation concerning the remedy, which is created and regulated by law and therefore cannot be changed by the parties.

Although this mode of reasoning causes no difficulty when ap-

as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make." *Per McKenna, J.*

¹ Matter of N. Y. R. R. Co., 98 N. Y. 447 (1885).

² Brown v. Insurance Co., 24 Ga. 97 (1858).

³ Insurance Co. v. Candle Co., 31 Pa. 448 (1855).

⁴ Knorr v. Bates, 35 N. Y. Supp. 1060 (1895).

⁵ 94 U. S. 535 (1876).

⁶ 111 N. E. 678 (Mass. 1916).